No. 47

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

LAWRENCE CALLANAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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ARGUMENT.

The Government argues that the "specific prohibition against conspiracy in this section was necessary to authorize the heavier punishment for that offense which this statute fixes, as against the five year punishment of the

general conspiracy statute, 18 U. S. C. 371, and two years under former 18 U. S. C. (1946 ed.) 88. There is no reason to believe that Congress had any other purpose in mind". But the general conspiracy statute does not punish the same type of conspiracy as that covered by this statute. The general conspiracy statute requires the commission of an overt act, that a conspirator do any act "to effect the object of the conspiracy". The Anti-Racketeering Act conspiracy does not require an overt act to complete the offense. **Ladner v. United States,** 5 Cir., 168 F. 2d 771, 773, cert. den., 335 U. S. 827. Rather it, as does the Sherman Anti-Trust Act, proscribes against conspiracies "on the common-law footing". **Nash v. United States,** 299 U. S. 373, 376-378. See also **Singer v. United States,** 323 U. S. 338, 340. The omission of this overt act requirement would in itself be an additional reason for concluding that cumulative punishment was not intended. This Court should not lightly assume in the absence of legislative evidence that Congress meant to impose a twenty year penalty for a conspiracy which did not manifest itself by an overt act and intended an additional penalty of twenty years for the consummation of that agreement. Especially is this so when the only committee report which sheds light on this issue indicates that the substantive provisions were included to avoid the limitations of the Sherman Act and to cover all restraints of commerce, whether in the form of conspiracies or not. S. Rep. No. 532, 73d Cong., 2d Sess.

The Government also contends that the doctrine that Congress has the power to punish separately a conspiracy and a substantive offense was unquestioned when the Anti-Racketeering Law of 1934 and the Hobbs Act of 1946 were passed. This Court did not think that issue was settled in 1946 when it considered **Pinkerton v. United States,** 328 U. S. 640. While the Hobbs Act was enacted into law less than thirty days after the Pinkerton decision and before the motion for rehearing was denied, yet the Government

points to nothing to indicate that it was brought to the attention of Congress. This issue was also not considered when this statute was included in the revision of Title 18 in 1948.

Inherent in the Government's position is that Congress by the organization of the statute in the 1934 and 1946 Acts intended that a violation of each section of the statute could be separately punished. That view leads to the conclusion that if all sections were violated by a single course of conduct, the wrongdoer would be subject to eighty years of imprisonment. This Congress "has not done so in words in the provisions defining the crime and fixing its punishment". **Bell v. United States,** 349 U. S. 81, 83. Its argument ignores the overlap of the various subsections in both the 1934 and 1946 Acts. For example, it treats as one conspiracy and concert of action. It overlooks the fact that concerted action may exist without a conspiracy because its constituents, aiding, abetting, counseling "are not terms which presuppose the existence of an agreement". **Pereira v. United States,** 347 U. S. 1, 11.

The fact that a combination of persons to commit a crime might outweigh in injury to the public the mere commission of the contemplated crime in itself may be an indication of Congressional intent that the combination itself and the completed crime are subject to the same maximum penalty, leaving to the discretion of the trial court the determination of the extent of the public injury in imposing a penalty within the twenty year maximum.

We believe that this case is within the policy of **Prince v. United States,** 352 U. S. 322, 329, "of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history".

CONCLUSION.

For the reasons set out above and for those set out in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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